IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JOEY SOTO,
Appellant.

No. 2 CA-CR 2018-0055
Filed December 12, 2018

Appeal from the Superior Court in Greenlee County
No. CR201700054
The Honorable Monica L. Stauffer, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Karen Moody, Assistant Attorney General, Tucson
Counsel for Appellee

The Stavris Law Firm PLLC, Scottsdale
By Christopher Stavris
Counsel for Appellant

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Vásquez and Judge Eppich concurred.

E S P I N O S A, Judge:

¶1 Following a jury trial, Joey Soto was convicted of administering a dangerous drug to another person, and the trial court sentenced him to an enhanced, aggravated, twenty-eight-year term of imprisonment. On appeal, Soto argues the court erred by "granting victim status" to the victim's mother and denying his mistrial motion predicated on an alleged *Brady*[1] violation. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to upholding the jury's verdict. *State v. Kindred*, 232 Ariz. 611, ¶ 2 (App. 2013). In March 2016, Soto, through Facebook, contacted T.A., an adult with mild-to-moderate microcephaly resulting in developmental delays, physical impairments, memory loss, and an approximate mental age of eight to ten years. Soto and T.A. began a romantic relationship, communicating online and over the phone and meeting in person several times. On April 4, 2016, T.A. drove to Soto's house, and when they were preparing to engage in sex, Soto gave T.A. a "butt rocket" by pouring a white crystalline substance into a syringe with no needle and placing it in her anus. The substance caused T.A. to feel a burning sensation that night. She later told a relative about having sex with Soto, and it was passed on to T.A.'s mother, S.B. On April 7, S.B. took T.A. to the hospital for a rape examination. Afterwards, S.B. and T.A.'s father went to Soto's home and confronted him about the incident. Soto admitted he had injected T.A. with "crystal meth," to enhance her sexual experience.

¶3 When subsequently interviewed by a Greenlee County sheriff, Soto stated T.A. had consented to the sexual encounter and wanted to "get high," which is why he had administered the methamphetamine. Soto further stated that T.A. did not seem to react to the methamphetamine,

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[1]*Brady v. Maryland*, 373 U.S. 83 (1963).

but when she later told him she had been unable to sleep, he explained it was due to the drug. In July 2016, S.B. was appointed T.A.'s permanent guardian.

¶4 At trial, the state's criminalist testified that no methamphetamine appeared in T.A.'s urine sample three days after the encounter, and Soto's expert explained that the negative test indicated either no methamphetamine had been administered or it was "very unpure." Soto testified he had not actually administered methamphetamine to T.A. but instead only used a syringe containing water. He claimed he told T.A.'s parents he administered the drug only "to highlight the fact that her daughter is not as innocent as [S.B.] thinks she is."

¶5 As noted above, the jury found Soto guilty, and he was sentenced to an aggravated, enhanced, twenty-eight-year term of imprisonment. We have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033.

Pretrial Discovery Motion

¶6 Before trial, Soto filed a motion to compel an interview of S.B.; the state opposed, arguing she was entitled to victim status under A.R.S. § 13-4401 due to T.A. being incapacitated. The trial court denied the motion, but not on the ground urged by the state, instead finding S.B. a "victim representative," and concluding that as such, she was not subject to a compelled interview. On appeal, Soto contends generally that the court erred by "granting victim status" to S.B., pointing out that he did not cause T.A.'s incapacity.[2] The state responds that the court properly denied Soto's motion because A.R.S. § 13-4433(G) allows the victim representative of a vulnerable adult to refuse an interview[3] and, alternatively, because S.B.

[2]Section 13-4401(19), A.R.S., defines "victim" as "a person against whom the criminal offense has been committed," "or if the person is killed or incapacitated, the person's spouse, parent, [or] child . . . ."

[3]Section 13-4433(A), A.R.S., provides that "the victim shall not be compelled to submit to an interview on any matter . . . that is conducted by the defendant, the defendant's attorney or an agent of the defendant." In *Lincoln v. Holt*, we held that the subsection enabling the parent or legal guardian of a minor to exercise victims' rights on behalf of the minor child, (now subsection G), also granted the parent or guardian the right to refuse a defense interview on his or her own behalf. 215 Ariz. 21, ¶ 6 (App. 2007).

herself qualified as a victim under A.R.S. § 13-4401(19). Soto did not respond by way of a reply brief and has not argued in any meaningful way that S.B. was improperly considered a victim representative or that A.R.S. § 13-4433(G) does not preclude a defense interview of the victim representative of a vulnerable adult;[4] he therefore has waived the issue on appeal. *State v. Moody*, 208 Ariz. 424, n.9 (2004) (insufficient argument constitutes abandonment and waiver of a claim); *see also* Ariz. R. Crim. P. 31.10(a)(7) (appellant's brief shall include his argument, supporting reasons, and citations to legal authorities).

¶7 Moreover, even if the issue were not waived, any error would be harmless because Soto does not explain what he may have obtained from a full pretrial interview that he did not otherwise receive or how that would have helped him present a complete defense. It is notable that he did not dispute S.B.'s testimony about his admission to her regarding the incident—rather, he acknowledged his statements to S.B. and T.A.'s father, but claimed he had lied to them. *See State v. Henderson*, 210 Ariz. 561, ¶ 18 (2005) (error is harmless when it "did not contribute to or affect the verdict or sentence"). Accordingly, we see no reversible error and do not address the issue further.

Mistrial Motion

¶8 Soto next argues the trial court erred in denying his mistrial motion because the state violated its disclosure duty under *Brady* by failing to reveal that S.B. had prior convictions and in precluding evidence of her criminal history at trial. Although we generally review the denial of a mistrial motion for an abuse of discretion, *State v. Gulbrandson*, 184 Ariz. 46, 63 (1995), we review alleged constitutional infringements, including an alleged *Brady* violation, de novo, *State v. Sanders*, 245 Ariz. 113, ¶ 89 (2018); *State v. Jessen*, 130 Ariz. 1, 4 (1981) (*Brady* violation a denial of due process).

¶9 A *Brady* violation occurs when the state fails to disclose impeachment evidence material to proving or disproving a defendant's

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The state argues this protection extends to parents and guardians of vulnerable adults.

[4]Without citing authority or arguing how we should interpret any applicable statutes, Soto contends only that "[h]ad [T.A.] been a minor . . . , either [her] parent or legal guardian may have rightfully exercised [her] rights on [her] behalf," but because she was not a minor, "the trial court should not have allowed [S.B.] to avoid being interviewed."

guilt. *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). There are three components to such a violation: (1) the evidence must be favorable to the defendant; (2) it must have been suppressed by the state, either willfully or inadvertently; and (3) prejudice must have ensued. *Id.* Undisclosed evidence is material, and therefore prejudicial, "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985).

¶10 On the second day of trial, during a recess from S.B.'s testimony, Soto's counsel informed the trial court that S.B.'s guardianship petition noted a felony conviction, but the state had not disclosed any criminal history before trial. After the recess, the state informed the court it had found no convictions in the public record or its database but had found one in the probation files, under a different name. The parties then determined S.B. had been convicted in 2005 of attempted DUI, a class five felony, and in 2009 of attempted unlawful use of means of transportation, a class one misdemeanor. Soto moved for a mistrial and dismissal with prejudice based on failure to timely disclose. The court denied the motion and continued the trial for three weeks to allow Soto to interview S.B. about the convictions. Soto's motion for reconsideration was denied. When trial reconvened, the court precluded evidence of S.B.'s convictions as too remote in time and not bearing on her credibility, relying on Rules 608 and 609, Ariz. R. Evid.

¶11 The state concedes that if admissible, evidence of S.B.'s prior convictions "would have been impeaching and therefore favorable to Soto," and further concedes that it "inadvertently suppressed the convictions." Accordingly, the question is whether prejudice ensued. Soto contends he was prejudiced because by the time he learned of S.B.'s convictions, "the jury had heard her testimony and had already drawn their conclusions as to her credibility as a witness," and because the "trial court's method in handling this issue" did not provide an adequate remedy. The state responds that the trial court properly denied a mistrial because the evidence was inadmissible pursuant to Arizona Rule of Evidence 609," the "late-disclosed evidence was discovered in time to present it to the jury," and "the trial was continued to allow Soto to prepare."

¶12 We find no prejudice for several reasons. First, the trial court properly precluded reference to the convictions under Rule 609, Ariz. R.

Evid.[5] That rule permits admission of a felony conviction older than ten years only if its "probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect," Rule 609(b), and allows admission of any crime, including a misdemeanor, if the elements of the crime required proof of "a dishonest act or false statement," Rule 609(a)(2). On appeal, Soto challenges the court's preclusion of the 2005 DUI-related felony for being "in excess of ten years." But he has ignored the court's conclusion that he failed to establish admissibility under Rule 609(b) and has not argued the conviction's probative value substantially outweighed its prejudicial effect; he therefore has not shown the court abused its discretion in precluding the DUI-related conviction.

¶13 Soto's contention that the trial court erroneously precluded the 2009 unlawful use of means of transportation conviction "solely on the basis that [it] was a misdemeanor" is likewise unpersuasive. He argued below that the conviction was admissible either under Rule 609(a)(2) because it involved a dishonest act or false statement, or, under Rule 608 as a specific instance of S.B.'s character for untruthfulness that the court could admit on cross-examination.[6] The court precluded the conviction under Rule 609 and declined to make a ruling under Rule 608. To the extent Soto now argues the court erred in precluding the conviction because, contrary to its conclusion, the conviction involved a dishonest act, the elements of the offense refute that contention.[7]

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[5] We review the trial court's exclusion of evidence for abuse of discretion. *State v. Robinson*, 165 Ariz. 51, 56 (1990).

[6] Soto argued below that inconsistencies between the factual basis for the conviction described to defense counsel when she interviewed S.B. and the factual basis provided to the trial court show S.B. "potentially perjured herself" and was "either being untruthful [to counsel], or was untruthful [to the court]." But Soto has not argued that the court's ruling was erroneous under Rule 608(b) and he has therefore waived that claim. *State v. Bolton*, 182 Ariz. 290, 298 (1995) (failure to argue claim on appeal constitutes waiver of that claim).

[7] Unlawful use of means of transportation requires that a person "[k]nowingly take[] unauthorized control over another person's means of transportation" or "[k]nowingly is transported . . . in a vehicle that the person knows or has reason to know is in the unlawful possession of another." A.R.S. § 13-1803(A). Neither proof of a dishonest act nor a false statement is required. *See State v. Winegardner*, 243 Ariz. 482, ¶ 12 (2018)

¶14 We also reject Soto's argument that he was prejudiced because S.B.'s credibility as a witness had already been established. When the undisclosed criminal history came to light, the state was still questioning S.B. on direct examination, and Soto had not yet cross-examined her. Soto still had a full opportunity to challenge S.B.'s credibility as a witness and raise any inconsistencies in her testimony when trial reconvened. And in any event, the convictions were properly precluded, thus Soto was not deprived of any opportunity to present admissible evidence at trial. *See Jessen*, 130 Ariz. at 4 (no *Brady* violation where defense had opportunity to present the evidence at trial).

¶15 Finally, to the extent Soto suggests the continuance was not an adequate remedy for the disclosure violation, he has not provided any law or argument as to why the three-week postponement to gather police reports, interview witnesses, and obtain evidence on the issue of S.B.'s prior convictions was inadequate. He has therefore waived any argument in this regard as well. *Moody*, 208 Ariz. 424, n.9; *see also* Ariz. R. Crim. P. 31.10(a)(7). Because there is no reasonable probability that the result of the trial would have been any different had S.B.'s convictions been timely disclosed, Soto suffered no prejudice, and the trial court did not abuse its discretion in denying a mistrial.

Disposition

¶16 For the foregoing reasons, Soto's conviction and sentence are affirmed.

(construing "dishonest act or false statement" narrowly "to include only those crimes that involve deceit, untruthfulness, or falsification").